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January 28, 2005

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JAN 28 2005

**Federal Communications Commission
Office of Secretary**

VIA HAND DELIVERY

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Petition for Reconsideration and/or Clarification of Order on
Reconsideration

Dear Ms. Dortch:

Covad Communications Group, Inc., NuVox Communications, Inc. and XO Communications, Inc., through counsel and pursuant to 47 C.F.R. § 1.429, hereby enclose for filing with the Federal Communications Commission an original and eleven (11) copies of the above-referenced Petition for Reconsideration and/or Clarification of Order on Reconsideration. Enclosed please also find a duplicate of this filing and a self-addressed envelope. Please date-stamp the duplicate upon receipt and return it in the envelope provided.

Please feel free to contact the undersigned counsel at (202) 887-1211 if you have any questions or require further information.

Respectfully submitted,

Brett Heather Freedson

Brett Heather Freedson

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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JAN 28 2005

**Federal Communications Commission
Office of Secretary**

In the Matter of)	
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act of)	
1996)	
)	
Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

**PETITION FOR RECONSIDERATION AND/OR CLARIFICATION OF
ORDER ON RECONSIDERATION**

Covad Communications Group, Inc., NuVox Communications, Inc. and XO Communications, Inc. (together, the "Petitioners"), through counsel and pursuant to 47 C.F.R. § 1.429, hereby request that the Commission reconsider and/or clarify, to the extent necessary, portions of its Order on Reconsideration in the above-captioned proceedings.¹ Specifically, the Petitioners request that the Commission confirm its prior holdings that the ILECs must provide unbundled access to enterprise loops irrespective of the underlying loop technology used by the ILECs to provide service. Further, to avoid any uncertainty, the Commission should confirm that its re-characterization of mass market FTTC loops as FTTH loops in no way hinders unbundled access to "enterprise market" loops (e.g., DS1 and DS3 loops). To the extent a further delineation between the "mass market" and "enterprise market" is deemed necessary, the

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, FCC 04-248, Order On Reconsideration, 19 FCC Rcd 2093 (rel. Oct. 18, 2004) ("FTTC Order").

Commission should confirm that the mass market FTTC loops to which the Commission's *FTTC Order* applies are comprised solely of loop facilities used to serve residential and single line, small business end users. Finally, the Commission should confirm its prior proscriptions against ILECs altering or constructing their networks in a manner that deprives CLECs unbundled access to enterprise loops (e.g., DS1 loops and DS3 loops), and to the TDM transmission interfaces and capabilities of the ILECs' networks commonly used by CLECs to access enterprise loops.

I. THE COMMISSION SHOULD CONFIRM THAT FTTC UNBUNDLING RELIEF APPLIES ONLY TO MASS MARKET CONSUMERS, DEFINED AS RESIDENTIAL AND SINGLE LINE SMALL BUSINESS END USERS

The *FTTC Order* repeatedly references only mass market FTTC loops as the subject of the Commission's FTTC-related determinations.² In the *FTTC Order*, the Commission concluded that the ILECs are not required to provide unbundled access to new mass market FTTC deployments. The Commission repeatedly described the relief granted as limited to mass market FTTC loops. The Commission, however, did not specifically delineate what it meant by the "mass market," potentially leading to confusion, uncertainty and costly litigation.³ The Commission should confirm that the unbundling relief granted under the *FTTC Order* applies only to mass market loops, and not to enterprise loops (e.g., DS1s or DS3s), where there has been a clear finding of impairment.

If the Commission desires further clarification in this regard, the Commission also should define "mass market" customers as residential and single line business end users. The definition of the "mass market" proposed by the Petitioners is consistent with the Commission's previous definition of the "mass market," under the *Triennial Review Order*.

² See, e.g., *FTTC Order*, at ¶ 2.

³ See *id.*

Specifically, the Commission already has found that the mass market “consists primarily of residential and similar, very small, business users of analog POTS.”⁴ In contrast, the Commission found that loops at the DS1 level and above are used to serve enterprise customers, whereas voice-grade analog loops (whether provisioned over copper or hybrid copper-fiber loops) typically are used to serve customers associated with the mass market.⁵

DS1 level and above loops clearly are associated with the enterprise market. Customers served through DS1 loops typically require specialized services or equipment, and have sophisticated telecommunications needs. For example, one of the most popular products for this customer segment is the integrated T1 product, which requires installation of an integrated access device on the customer premises, and provides the customer with voice and data services over the same access connection. Such service is inherently an enterprise market service. Moreover, DS1 level and above customers often obtain service pursuant to contracts with their telecommunications vendors – a hallmark of the enterprise market. By contrast, the residential customers typically associated with the mass market ordinarily will purchase a single DS0 voice line. Indeed, there is no evidence on the record suggesting that ordinary mass market consumers purchase the much more expensive DS1 and DS3 loop services typically used by enterprises.

Accordingly, the Commission should confirm its existing qualification of the relief for mass market FTTC loops by making clear that it relieves ILECs *only* of the obligation to unbundle FTTC loops used to serve the mass market, while preserving the ILECs’ obligations to unbundle enterprise loops (e.g., DS1 loops and DS3 loops) over FTTC facilities. Nonetheless, if the Commission desires further clarification in this regard, for the purpose of determining

⁴ *Triennial Review Order*, at n. 624.

⁵ *Id.*

whether a FTTC loop deployment is a “mass market” loop (which is not subject to section 251 unbundling requirements), or an “enterprise loop” (which is subject to section 251 requirements), the Commission should confirm that the “mass market” includes only residential customers and single line business customers.

II. THE COMMISSION SHOULD CONFIRM THAT CLECS ARE ENTITLED TO ACCESS UNBUNDLED ENTERPRISE LOOPS, INCLUDING DS1 AND DS3 LOOPS, REGARDLESS OF THE UNDERLYING TRANSMISSION TECHNOLOGY USED BY THE ILECS

The Commission should confirm that the ILECs’ continuing obligation to unbundle enterprise loops applies regardless of the underlying transmission technology, including FTTC loops. The Commission’s previous statements in the *Triennial Review Order* make clear that the ILECs must continue to make such facilities available regardless of the underlying technology. Specifically, under the *Triennial Review Order*, the Commission held that enterprise loops must remain available to requesting carriers, on an unbundled basis, regardless of the technology that such carriers deploy. In that regard, the Commission stated:

DS1 loops will be available to requesting carriers, without limitation, regardless of technology used to provide such loops, e.g., two-wire and four-wire HDSL or SHDSL, fiber optics or radio, used by the incumbent LEC to provision such loops and regardless of the customer for which the requesting carrier will serve unless otherwise specifically indicated. The unbundling obligation associated with DS1 loops is in no way limited by the rules we adopt today with respect to hybrid loops typically used to service mass market customers.⁶

Thus, to avoid any dispute over this critical unbundling obligation, the Commission should confirm that no matter the technology, e.g., FTTC, the ILECs must provide access to DS1 and DS3 loops, on an unbundled basis, as requested by CLECs to provide service to their customers.

⁶ *Id.*, at ¶ 325 and n. 956 (internal citations omitted).

The Commission also should codify in its rules that requesting carriers may obtain access to enterprise loops, on an unbundled basis, even in the context of FTTC, FTTH or hybrid copper-fiber loops. Specifically, the Petitioners propose that the Commission add the following language to each section 51.319(a)(4) and (a)(5) of its rules, 47 C.F.R. § 51.319(a)(4) and (a)(5):

Enterprise loops, including but not limited to DS1 and DS3 loops, subject to unbundling requirements shall be available to requesting telecommunications carriers, without limitation, regardless of the technology used by the incumbent LECs to provide such loops, e.g., two-wire and four-wire HDSL and SHDSL, fiber optics, or radio. Access to enterprise loops, including but not limited to DS1 and DS3 loops, shall in no way be limited or restricted by the provision of sections 51.319(a)(2) and (a)(3).

Similar language was proposed by NewSouth Communications Corp. and the CompTel/Ascent Alliance in these proceedings, with respect to FTTH loops, and the Petitioners' proposed rule is consistent with note 956 of the *Triennial Review Order*.⁷

The continuing availability of enterprise loops and subloops, regardless of the technology used, or whether a network capability is new or old, is equally clear from the Commission's impairment analysis, and in fact, was a primary justification for the Commission's decision to eliminate unbundling relief for the mass market. In the *Triennial Review Order*, the Commission granted ILEC unbundling relief for the packetized capabilities of hybrid loops that enable requesting carriers to provide broadband services to the mass market.⁸ In granting such relief, the Commission stated that it was "guided by the availability of other loop alternatives within the networks of the incumbent LECs."⁹ Specifically, the Commission reasoned that "unbundled access to incumbent LEC copper subloops adequately addresses the impairment

⁷ NewSouth Communications Corp. and CompTel/ASCENT Alliance Opposition to BellSouth's Petition For Clarification and/or Partial Reconsideration, CC Docket Nos. 01-338, 96-98 and 98-147 (filed Nov. 6, 2003) at 11.

⁸ *Triennial Review Order*, at ¶ 288.

⁹ *Id.*, at ¶ 291.

competitive LECs face so that intrusive unbundling requirements on incumbent LEC packetized fiber loops facilities is not necessary.¹⁰

In addition to ordering subloop unbundling, the Commission required that the ILECs “continue providing unbundled access to the TDM-based features, functions, and capabilities of their hybrid loops where impairment exists.”¹¹ The Commission reasoned that “the availability of TDM-based loops, such as DS1s and DS3s, provide competitive LECs with a range of options for providing broadband capabilities.”¹² Indeed, in *USTA II*, the Court of Appeals for the District of Columbia Circuit upheld the Commission’s elimination of unbundling obligations for hybrid loops in part because the availability of loop alternatives, in the form of unbundled enterprise loops and subloops, would mitigate the potential harm of denying CLEC access in the face of impairment.¹³ Importantly, the Commission also specifically informed the court that carriers would continue to have access to ILEC fiber to serve business customers. Specifically, the Commission’s Opposition to the Allegiance Telecom’s Motion to stay the *Triennial Review Order* was based, in substantial part, on the Commission’s finding that Allegiance would not suffer competitive harm in the enterprise market under the Commission’s FTTH-related rules because CLECs, including Allegiance, would receive continued access to ILEC fiber, as necessary to serve their enterprise customers with DS1 and DS3 loops.¹⁴

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *USTA II*, 359 F.3d at 582. The other mitigating circumstance identified by the Commission and the D.C. Circuit was the existence intermodal competition from cable technologies, which exists only in the mass market. *Id.*

¹⁴ *Allegiance Telecom, Inc. et al. v. FCC*, D.C. Cir. No. 03-1316, Opposition of the Federal Communications Commission to Allegiance Telecom’s Motion for Stay Pending Review (filed Oct. 31, 2003) at 2 (“it is not likely that the FTTH rule will have any significant impact on Allegiance’s ability to serve its existing residential and small business customers . . . [w]ith respect to Allegiance’s larger business customers, the Commission

III. THE COMMISSION SHOULD FORBID ILECS FROM RECONFIGURING OR CONSTRUCTING THEIR NETWORKS IN A MANNER THAT DENIES CLECS ACCESS TO UNBUNDLED DS1 AND DS3 LOOPS

As ALTS correctly noted in these proceedings, “removing ILEC obligations to make the network modifications to provide TDM capability would allow the ILEC to reconfigure its network to eliminate competition.”¹⁵ Importantly, in the *FTTC Order*, the Commission responded to ALTS’ concern only by stating that the ILECs are “not obligated to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability.”¹⁶ The Petitioners are nonetheless concerned that the language of the *FTTC Order* will be inappropriately misconstrued by the ILECs to limit unbundled access to TDM based services and capabilities, such as unbundled DS1 and DS3 capable loops. This would be directly contrary to established Commission policy and inconsistent with the Commission’s impairment findings for enterprise loop markets,¹⁷ which the Commission recently reaffirmed in large part.¹⁸ The Commission should reaffirm its enterprise loop unbundling requirements here, and avoid creating an inadvertent loophole that could very well swallow its unbundling requirements over time.

Despite the express requirement imposed by the *Triennial Review Order*, the Petitioners remain wary that the ILECs will take the view that they are entitled to reconfigure or

preserved access to incumbents’ fiber loops and there can be no harm at all”) (emphasis in original); *see also id.*, at 12 (“The text, as well as the rules themselves, make it clear that DS1 and DS3 loops remain available as UNEs at TELRIC prices”) (citing 51.319(c)(4), (a)(5)).

¹⁵ Opposition to Petitions for Reconsideration of the Association for Local Telecommunications Services, CC Docket Nos. 01-338, 96-98 and 98-147 (filed Nov. 6, 2003).

¹⁶ *FTTC Order*, at ¶ 20.

¹⁷ *See Triennial Review Order*, at ¶¶ 302-327 (concluding that CLECs are impaired without access to unbundled DS1 and DS3 loops).

¹⁸ FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, Federal Communications Commission (rel. Dec. 15, 2004) at 2.

reconstruct their networks in a manner that deprives CLECs unbundled access to DS1 and DS3 capacity loops by restricting CLECs' access to the TDM capabilities of hybrid copper-fiber loops. The Commission expressly prohibited the ILECs from "engineering the transmission capabilities of their loops in a way that would disrupt or degrade the local loop UNEs (either hybrid loops or stand-alone copper loops) provided to competitive LECs."¹⁹ The Commission must confirm that its prohibition includes any network modifications that would restrict CLEC access to DS1 and DS3 capacity loops through TDM based facilities.

The Commission already has determined that CLECs are impaired without unbundled access to DS1 and DS3 loops, regardless of the underlying technology used by the ILECs to provision those loops.²⁰ Moreover, the Commission already has ordered that CLECs are entitled to receive unbundled access to the TDM-compatible features, functions and capabilities of ILEC hybrid loops to provide narrowband and high-capacity services over DS1 and DS3 loops.²¹ Accordingly, nothing in the *FTTC Order* should be construed to relieve the ILECs of their existing obligations to unbundle the TDM capabilities necessary for CLECs to reach their customers using ILEC loop plant.

The Commission's requirement does not burden ILEC efforts to evolve and upgrade their networks. Indeed, as the evidence of record shows, the ILECs for some time have made incremental, evolutionary additions of packetized equipment to their legacy local exchange

¹⁹ *Triennial Review Order*, at ¶ 294.

²⁰ *See supra* n. 22 and 23.

²¹ *Triennial Review Order* at n. 627 ("Incumbent LECs must continue to provide unbundled access to the TDM features, functions and capabilities of their hybrid loops. This will allow competitive LECs to continue providing both traditional narrowband services (e.g., voice, fax, dial-up Internet access) and high capacity services like DS1 and DS3 circuits.")

networks,²² without in any way diminishing the availability of TDM based services, such as DS1 and DS3 loops. Furthermore, it is clear that the ILECs will continue to support existing enterprise loop interfaces and capabilities in their packet based networks, because of the overwhelming customer demand for DS1 and DS3 services, and their substantial legacy investment in these types of services.

Accordingly, in light of the fact that the Commission's decision not to require unbundling of packetized loops was expressly predicated on the ability of the CLECs to maintain access to unbundled TDM based loops, the Commission should confirm that the ILECs may not reconfigure or modify their networks in any way that would deny CLECs access to DS1 and DS3 loops. A contrary interpretation would undermine the permanent unbundling rules soon to be released by the Commission, which expressly require unbundling of DS1 and DS3 loops, absent data that rebuts the Commission's national finding of impairment with respect to a specified ILEC wire center.

Furthermore, the Commission should require the ILECs to take the steps necessary to provision industry standard DS1 and DS3 interfaces and transmission capabilities, including enterprise loops (*e.g.*, DS1 and DS3 loops), regardless of the underlying transmission technologies the ILECs choose to deploy in their local exchange network. The only way for the Commission to give substance to its proscription against ILECs degrading existing TDM transmission capabilities is for the ILECs to preserve equivalent capabilities and interfaces where they choose to make alterations or replacements to underlying TDM-based transmission infrastructure. Such an approach would best enable the ILECs to retain the flexibility to make

²² Letter from Praveen Goyal, Senior Counsel for Government and Regulatory Affairs, Covad Communications to Marlene Dortch, Secretary Federal Communications Commission (Jun. 2, 2004) Attachment.

incremental modifications to their network plant as they see fit, while preserving CLEC access to the existing TDM transmission capabilities, including enterprise loops (e.g., DS1 and DS3 loops), that the Commission sought to preserve in the *Triennial Review Order*.

IV. CONCLUSION

For the reasons set forth herein, the Commission should reconsider and/or clarify, to the extent necessary, portions of its *FTTC Order*, to ensure that unbundling relief is limited to mass market consumers, as the Commission intended, and that requesting carriers continue to have access to enterprise loops.

Respectfully submitted,

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